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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

The Bank of New York Mellon fka the Bank
of New York, as Trustee for the
Certificateholders of CWALT, Inc.,
Alternative Loan Trust 2005-47-CB,
Mortgage Pass-through Certificates Series
2005-47CB,

Plaintiff

v.
The Springs at Centennial Ranch
Homeowners Association, et al.,

Defendants

Case No.: 2:17-cv-01673-JAD-GWF

Order re: Summary Judgment

[ECF Nos. 82, 85, 87]

The Bank of New York Mellon brings this quiet-title action to determine the effect of the
2013 non-judicial foreclosure sale of a home on which the bank claims a deed of trust securing a
mortgage on the property. The sale was conducted under Nevada's statutory scheme that grants
homeowners' associations superpriority liens for a narrow category of unpaid fees and
assessments that accrue on homes in their communities and allows those associations to enforce
those liens with non-judicial foreclosure sales.¹ The bank sues SFR Investments Pool 1, LLC,
who purchased the property at the foreclosure sale, and the Springs at Centennial Ranch

¹ See *SFR Invs. Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 409–14 (Nev. 2014); *Bank of Amer. v. Arlington West Twilight HOA*, __ F.3d __, 2019 WL 1461317, *1 (Apr. 3, 2019). The statute was substantially amended in 2015, but this case involves the pre-amendment version.

1 Homeowners Association (HOA), who caused the sale to occur, seeking a determination that its
2 deed of trust survived the foreclosure.² SFR counterclaims for the opposite conclusion.³

3 All parties move for summary judgment. The bank argues that its tender of the super-
4 priority portion of the lien extinguished the HOA's lien, preserving its deed of trust despite the
5 foreclosure.⁴ SFR⁵ and the HOA⁶ argue that the bank's claim is time-barred by the applicable
6 statute of limitations and, regardless, it fails as a matter of law. I find that the bank's claim is
7 governed by a four-year statute of limitations, and because the bank filed this action more than
8 four years after the foreclosure sale, it is time-barred. But that conclusion does not permit me to
9 automatically enter summary judgment in favor of SFR on its own quiet-title claim, too.
10 Because there are genuine issues of fact surrounding the bank's affirmative defense that its
11 agent's tender satisfied the superpriority lien amount, preventing the foreclosure sale from
12 extinguishing the deed of trust, I deny summary judgment on SFR's quiet-title counterclaim.

13 **Background**

14 Clint and Elizabeth Harris purchased the home at 916 Malibu Sands in Las Vegas,
15 Nevada, in 2005, with a mortgage from Republic Mortgage, LLC, secured by a deed of trust that
16 designated Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary.⁷ MERS
17 assigned the deed of trust to the Bank of New York Mellon in July 2011.⁸ The home is located
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19² ECF No. 57.

20³ ECF No. 19.

21⁴ ECF No. 82.

22⁵ ECF No. 85.

⁶ ECF No. 87.

⁷ ECF No. 82-1 (deed of trust).

⁸ ECF No. 82-2 (assignment).

1 in the Springs at Centennial Ranch common-interest community⁹ and subject to its declaration of
2 covenants, conditions, and restrictions, which requires the owners of units within this
3 development to pay certain assessments.¹⁰ When the Harrises fell behind on their assessments,
4 the HOA commenced nonjudicial foreclosure proceedings on the home under Chapter 116 of the
5 Nevada Revised Statutes.¹¹

6 The bank's loan servicer, Bank of America, learned of the impending foreclosure in
7 2009, so its counsel, the law firm of Miles, Bauer, Bergstrom & Winters, LLP, attempted to stop
8 the foreclosure by tendering \$483.75, which represented nine months of monthly HOA
9 assessments ($\$53.75 \times 9 = 483.75$), and which Miles Bauer argued was the entirety of the
10 superpriority lien.¹² The HOA's agent Alessi & Koenig, LLC rejected and sent back the check,
11 explaining that it believed that the HOA had a superpriority lien not just for nine months of
12 assessments, but for collection costs, too, which totaled thousands of dollars.¹³ More than three
13 years later on January 16, 2013, Alessi & Koenig went through with the foreclosure sale.¹⁴ SFR
14 was the winning bidder at \$8,800.¹⁵

15 As the Nevada Supreme Court held in *SFR Investments Pool 1 v. U.S. Bank* in 2014,
16 because NRS 116.3116(2) gives an HOA "a true superpriority lien, proper foreclosure of" that
17 lien under the non-judicial foreclosure process created by NRS Chapters 107 and 116 "will
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19⁹ ECF No. 31-1 at 18.

20¹⁰ ECF No. 82-3.

21¹¹ ECF Nos. 82-4–82-6 (notices).

22¹² ECF No. 82-8 at 14–18 (correspondence and check).

¹³ *Id.* at 20.

¹⁴ ECF Nos. 82-9 (notice of trustee's sale); 82-10 (trustee's deed upon sale).

¹⁵ ECF No. 82-10.

1 extinguish a first deed of trust.”¹⁶ Four years and five months after the foreclosure sale, the bank
2 filed this action to save its deed of trust from extinguishment. It pursues a single claim for quiet
3 title.¹⁷ SFR asserts its own quiet-title counterclaim against the bank and MERS, seeking
4 declaratory and injunctive relief that it owns the property free and clear of any other interest.¹⁸

5 All parties now move for summary judgment. The first-filed motion belongs to the bank.
6 It argues that its agent’s \$483.75 tender satisfied the superpriority portion of the lien and
7 preserved its deed of trust or, at the very least, the sale should be equitably set aside because the
8 sale price was grossly inadequate and the sale was unfair and oppressive.¹⁹ SFR and the HOA
9 argue that the bank’s claim is governed by a three- or four-year statute of limitation and is thus
10 time-barred, and SFR asks for summary judgment against the bank and MERS on its
11 counterclaim.²⁰ I first evaluate the timeliness of the bank’s claim, and then I consider whether
12 SFR is entitled to summary judgment on its counterclaim.

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17 ¹⁶ *SFR Invs. Pool 1 v. U.S. Bank*, 334 P.3d at 419.

18 ¹⁷ Although the bank technically pleads a claim for quiet title and a second claim captioned
19 “Injunctive Relief against SFR,” injunctive relief is a remedy, not a claim for relief, and it rises
20 and falls on the merits of the bank’s quiet-title claim. *See* ECF No. 57. So I treat the bank’s
amended complaint as a single quiet-title claim that seeks declaratory relief and injunctive relief.
I similarly treat SFR’s separate claims for quiet title and injunctive relief as a single quiet-title
claim. *See* ECF No. 19. The bank originally pled additional claims that have since been
dismissed. *See* ECF No. 55 (dismissal order).

22 ¹⁸ ECF No. 19 (SFR’s counterclaim). Although the Harrises were also defendants to both the
bank’s and SFR’s claims, the claims against them have been dismissed. *See* ECF No. 68.

¹⁹ ECF No. 82.

²⁰ ECF No. 32.

Analysis

A. The bank's claim is time-barred.

The bank waited four years and five months after the foreclosure sale to file this action.²¹

4 The parties generally characterize all claims in this case as quiet-title claims. Both SFR and the
5 HOA argue that the bank's claim is a statute-based one subject to a three-year statute of
6 limitations under NRS 11.190(3)(a) or, at best, the court must apply the catch-all four-year
7 deadline in NRS 11.220; either way, the bank's action is time-barred. The bank contends that its
8 claim either has no deadline or enjoys a ten-year grace period.²²

1. Categorizing the bank's claim

10 To evaluate claims, “we must look at the substance of the claims, not just the labels
11 used.”²³ The bank’s claim is labeled “quiet title” and its general purpose is to challenge the
12 impact of the foreclosure sale on the deed of trust.²⁴ This requested equitable relief makes the
13 bank’s claim the type of quiet-title claim recognized by the Nevada Supreme Court in *Shadow*
14 *Wood Homeowners Association, Inc. v. New York Community Bancorp*—an action “seek[ing] to
15 quiet title by invoking the court’s inherent equitable jurisdiction to settle title disputes.”²⁵ The
16 resolution of such a claim is part of “[t]he long-standing and broad inherent power of a court to

²¹ The sale occurred January 16, 2013, and this suit was filed on June 15, 2017.

||²² ECF No. 90 at 3.

²¹ ²² ²³ *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cty. of Clark*, 102 P.3d 578, 586 (Nev. 2004).

²⁴ ECF No. 57 at 7–11.

²⁵ *Shadow Wood Homeowners Ass'n, Inc. v. New York Cnty. Bancorp*, 366 P.3d 1105, 1110–1111 (Nev. 2016).

1 sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances
2 support” it.²⁶

3 **2. The bank’s claim was time-barred four years after the foreclosure sale.**

4 The next step is determining what statute of limitation applies to the bank’s equitable
5 claim to quiet title. The bank argues that its claim is “not subject to a statute of limitations”
6 based on the Nevada Supreme Court’s opinion in *Facklam v. HSBC Bank*.²⁷ But *Facklam* has no
7 application here. In *Facklam*,²⁸ the Court merely held that non-judicial foreclosure actions are
8 not subject to the statutes of limitation in NRS Chapter 11 because those time bars apply only to
9 judicial actions, and a non-judicial foreclosure is not a judicial action.²⁹ So “lenders are not
10 barred from foreclosing on mortgaged property merely because the statute of limitations for
11 contractual remedies on the note has passed.”³⁰ This case is not a non-judicial foreclosure
12 action, however—it’s a lawsuit seeking equitable relief, so it falls under the “civil action”
13 umbrella and is subject to the limitations periods in NRS Chapter 11.³¹

14 The bank argues alternatively that if a limitation period applies, its claim is governed by
15 NRS § 106.240, which states that a lien created by a recorded deed of trust “shall at the
16 expiration of 10 years after the debt secured by the mortgage or deed of trust according to the
17 terms thereof or any recorded written extension thereof become wholly due, terminate, and it
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19²⁶ *Id.* at 1112.

20²⁷ ECF No. 90 at 3.

21²⁸ *Facklam v. HSBC Bank*, 401 P.3d 1068, 1071 (Nev. 2017).

22²⁹ *Id.* at 1070.

³⁰ *Id.*

³¹ See Nev. Rev. Stat. § 11.010 (providing that “Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute.”).

1 shall be conclusively presumed that the debt has been regularly satisfied and the lien
2 discharged.”³² But this section “creates a conclusive presumption that a lien on real property is
3 extinguished ten years after the debt becomes due,” it is not a statute of limitation.³³

4 Still, I also cannot agree with SFR and the HOA that the bank’s claim is subject to the
5 three-year statute of limitations in NRS 11.090(3)(a).³⁴ That statute governs actions “upon a
6 liability created by statute, other than a penalty or forfeiture.”³⁵ But the bank’s claim is not an
7 action upon a liability created by statute; it is an equitable action to determine adverse interests in
8 real property, as codified in NRS 40.010.³⁶ Section 40.010 does not create liability, and a party
9 cannot impose liability upon another through that statute. Rather, the statute allows for a
10 proceeding to determine adverse claims to property. Even if I interpret the bank’s quiet-title
11 action as a claim under NRS 116.3116, it still does not seek to impose liability under that statute.
12 So NRS 11.090(3)(a) does not apply.

13 With no squarely applicable limitations statute for the bank’s claim, I am left with the
14 catch-all four-year deadline in NRS 11.220, which states that “[a]n action for relief, not
15 hereinbefore provided for, must be commenced within 4 years after the cause of action shall have
16 accrued.”³⁷ Because the foreclosure sale occurred on January 16, 2013, and this action was filed
17 more than four years later on June 15, 2017, the bank’s claim is time-barred. I thus grant

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³² Nev. Rev. Stat. § 106.240.

³³ *Pro-Max Corp. v. Feenstra*, 16 P.3d 1074, 1077 (Nev. 2001).

³⁴ See ECF Nos. 85 at 11, 87 at 10–12.

³⁵ Nev. Rev. Stat. § 11.190(3)(a).

³⁶ See *supra* at p. 5; *Shadow Wood HOA*, 366 P.3d at 1111 (recounting that “NRS 40.010 essentially codified the court’s existing equity jurisprudence” (comma omitted)).

³⁷ Nev. Rev. Stat. § 11.220.

1 summary judgment in favor of the defendants and against the bank on the bank's claim,³⁸ and I
2 deny the bank's motion for summary judgment on this claim as moot.

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4 **B. Genuine issues of fact preclude summary judgment on SFR's counterclaim.**
[ECF No. 85]

5 SFR also asks for summary judgment on its own quiet-title claim against the bank and
6 MERS. MERS has not yet appeared in this case, so the proper vehicle for seeking judgment
7 against it is through default proceedings, not summary judgment. So I deny SFR's request for
8 summary judgment against MERS and consider the motion only against the bank.

9 SFR is not entitled to summary judgment on its counterclaim against the bank because
10 this record leaves genuine issues of fact about the bank's affirmative defense that the \$483.75
11 tender satisfied the superpriority portion of the HOA's lien and preserved the deed of trust.³⁹ If it
12 did, Nevada law precludes me from declaring that SFR bought this property free and clear of the
13 bank's lien interest. Six months ago in *Bank of America v. SFR Investments Pool 1, LLC*, the
14 Nevada Supreme Court held that a similar attempt to "tender cured the default as to the
15 superpriority portion of the HOA's lien, [so] the HOA's foreclosure on the entire lien resulted in
16 a void sale as to the superpriority portion. Accordingly, the HOA could not convey full title to
17 the property, as [the bank's] first deed of trust remained after foreclosure . . . [and] SFR
18 purchased the property subject to [the bank's] deed of trust." In that case, Bank of America
19 contacted the HOA to get clarification on the superpriority amount due. Based on the

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21 ³⁸ Because I grant summary judgment on this basis, I need not and do not reach SFR's or the
HOA's other challenges to the bank's claims.

22 ³⁹ The bank pled valid tender as an affirmative defense to SFR's counterclaim. *See* ECF No. 32
at 9 ("5. The super-priority lien was satisfied prior to the HOA foreclosure sale under the
doctrines of tender, estoppel, laches, waiver, and futility."). As the Nevada Supreme Court noted
in *Dredge Corp. v. Wells Fargo, Inc.*, 389 P.2d 394, 396 (Nev. 1964), "[I]mitations do not run
against defenses. The statute is available only as a shield, not as a sword."

1 information received from the HOA, the bank tendered nine months' worth of assessments to the
2 HOA. The HOA rejected the payment and sold the property at foreclosure to SFR.

3 The Nevada Supreme Court explained that “[a] valid tender of payment operates to
4 discharge a lien or cure a default.” Although a valid tender requires payment in full, for
5 purposes of satisfying an HOA’s superpriority lien and thus saving a deed of trust from
6 extinguishment under the version of the foreclosure statute in effect in 2013, the bank needed to
7 pay only “charges for maintenance and nuisance abatement, and nine months of unpaid
8 assessments.” Because the bank properly calculated nine months’ worth of assessments based on
9 the HOA’s information, “and the HOA did not indicate that the property had any charges for
10 maintenance or nuisance abatement,” the Court found that, “[o]n the record presented, this was
11 the full superpriority amount.”

12 The bank has made strides to demonstrate that a similar tender operated to extinguish the
13 HOA’s lien here and, thus, SFR took title of this property subject to its deed of trust. But the
14 bank’s offerings are not so complete. First, the timeline presented by its documents is
15 incomplete and messy. Although the notices reflect that the HOA was originally scheduling the
16 foreclosure sale for October 2009,⁴⁰ the bank’s agent’s first letter to the HOA’s agent inquiring
17 about the superpriority lien amount is dated January 26, 2015,⁴¹ and Alessi & Koenig’s response
18 fax is dated January 20, 2010⁴²—both of which should have been after the foreclosure sale.
19 Second, even if I were to overlook the parties’ failure to explain the discrepancy in these dates
20 and accept the notion that the bank’s loan servicer timely tendered a check for nine months’
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⁴⁰ ECF No. 82-6 at 2 (notice of trustee’s sale).

⁴¹ ECF No. 82-8 at 6.

⁴² *Id.* at 11.

1 worth of assessments before the sale, unlike in the recent *SFR* tender case, the HOA’s ledger
2 here reflects that this property may have incurred charges for maintenance or nuisance
3 abatement.⁴³ The record does not reflect that the bank made any attempt to satisfy those
4 additional unpaid charges. So, on this record, I cannot conclude as a matter of law whether the
5 bank tendered the full superpriority amount. Because genuine issues of fact preclude summary
6 judgment on SFR’s equitable quiet-title claim,⁴⁴ I deny SFR’s request for summary judgment on
7 this final claim.

8 **Conclusion**

9 IT IS THEREFORE ORDERED that

- 10 • The Springs at Centennial Ranch Homeowners’ Association’s Renewed Motion
11 for Summary Judgment [**ECF No. 87**] is **GRANTED**;
- 12 • SFR Investments Pool 1, LLC’s Revised Motion for Summary Judgment
13 [**ECF No. 85**] is **GRANTED** as to the bank’s claims, but denied as to SFR’s
14 counterclaims; and
- 15 • The Bank of New York Mellon’s Renewed Motion for Summary Judgment
16 [**ECF No. 82**] is **DENIED** as moot.

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20 ⁴³ See *id.* at 13–14 (listing such charges as “weeds/debris/shru” and “trash container”). See also
21 *Arlington West Twilight HOA*, 2019 WL 1461317, at *2 (“If the HOA’s ledger does not show
any charges for maintenance or nuisance abatement, a tender of nine months of HOA dues is
sufficient.”).

22 ⁴⁴ Because the issues of fact on the bank’s tender defense precludes summary judgment on SFR’s
claim, I need not and do not consider whether the bank’s other affirmative defenses present
genuine issues of fact. However, the parties well know by now that both the Nevada Supreme
Court and the Ninth Circuit have rejected the due process, facial unconstitutionality, and
Supremacy Clause theories. See *Arlington West Twilight HOA*, 2019 WL 1461317.

1 IT IS FURTHER ORDERED that **the Bank of New York Mellon's claims are all**
2 **DISMISSED as time-barred**, and this case proceeds forward on SFR's counterclaims against
3 the bank and MERS only.

4 IT IS FURTHER ORDERED that this matter is **referred to the magistrate judge for a**
5 **mandatory settlement conference. The parties' obligation to file a joint pretrial order is**
6 **suspended until 20 days after the settlement conference.**

7 Dated: April 5, 2019

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9 U.S. District Judge Jennifer A. Dorsey

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